Supreme Court, U.S.
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No. 93-1270

In The

Supreme Court of the United States

October Term, 1993

STATE OF CALIFORNIA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

Respondent,

MICHAEL L. PARR, et al.,

Real Parties In interest.

Petition for Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FILED BY REAL PARTIES IN INTEREST

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42 pp

QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit err in denying Petitioner's petition for writ of mandamus, which requested the Court of Appeals to vacate the District Court's order granting Real Parties' in Interest motion to compel discovery?

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I.

THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY REFUSED TO INVOKE THE EXTRAORDINARY REMEDY OF MANDAMUS AND THEREFORE THE PETITION OF CERTIORARI SEEKING REVIEW OF THE NINTH CIRCUIT'S DECISION SHOULD BE DENIED.

A. Introduction.

Notwithstanding Petitioner STATE OF CALIFORNIA's strenuous claims to the contrary (see, Petition, page 12), the controversy Petitioner seeks to bring before this Court involves a discovery dispute that was decided adversely to Petitioner on June 18, 1993, by the Magistrate Judge of the U.S. District Court for the Eastern District of California (Order filed 6/18/93, Petitioner's Appendix, pages 28-47). Petitioner requested reconsideration of this discovery order by the U.S. District Court Judge, and this request was denied on September 29, 1993, on the grounds that the order was not clearly erroneous or contrary to law (Order filed 9/29/93, Petitioner's Appendix, page 48). Petitioner's petition for writ of mandamus to review the District Court's affirmation of the discovery order was then denied on November 17, 1993 (Order filed 11/17/93, Petitioner's Appendix, page 1). In light of the refusal of these courts to vacate the discovery order, Petitioner was admonished by the Magistrate Judge on January 6, 1994 that its continuing failure to fulfill its discovery obligations as ordered by the court would subject it to sanctions under the Federal Rules of Civil Procedure, Rule 37(b) (Order filed 1/6/94, Petitioner's Appendix, pages 49, 51).

The issue before the Court thus does not involve the "application of the Fair Labor Standards Act ('FLSA' or 'Act') 29 USC §§ 206, 207, 216(b), 260; Code of Federal Regulations §§ 531.27, 531.34, and 531.35; and Federal Rules of Civil Procedure, Rule 37(b), in light of the Tenth Amendment, U.S. Constitution" as Petitioner claims (Petition, page 1). Rather, Petitioner prays for intervention by this Court in order to avoid the orderly operation of the Federal Rules of Civil Procedure for pre-trial discovery, and the well-established legal principles which govern the assertion of privilege by a governmental litigant. Such a case is not suited for review on a petition for certiorari. As Justice Brennan has noted:

> . . . ordinarily an application by the District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to the particular set of facts.
>
> *Appalachian Power Company v. American Institute of Certified Public Accts.*, (1959) 80 S.Ct. 16, 18 [Memorandum Order at 361 U.S. 887].

Of course, this principle applies with even greater force when a party seeks review by certiorari of the Court of Appeal's denial of a petition for mandamus.

The Court of Appeals for the Ninth Circuit denied Petitioner's petition for writ of mandamus on the grounds that it did not meet the requirements for issuance of the writ, citing *Bauman v. United States District Court*, (9th Cir. 1977) 557 F.2d 650. (Petitioner's Appendix, page 1.)

In *Bauman v. U.S. District Court, supra*, 557 F.2d at 654, the Ninth Circuit, guided by the precedent of this Court restricting the invocation of mandamus, set forth five guidelines for the determination of whether extraordinary relief is warranted. 557 F.2d at 657-661. The discovery controversy at stake in this case did not qualify under these guidelines for the issuance of mandamus, and therefore this Petition should be denied.

B. Petitioner has an Adequate Remedy Through Direct or Interlocutory Appeal.

The first guideline set forth in *Bauman v. U.S. District Court, supra*, 557 F.2d at 656, for issuance of a writ of mandamus requires the party seeking such relief to demonstrate that there are no other "adequate means" such as direct or interlocutory appeal under 28 USC § 1292(a)(1) for obtaining review. As the court explained,

> The availability of a direct appeal would weigh strongly against a grant of mandamus. Moreover, even if the grant of an interlocutory appeal from the order is not a foregone conclusion, the possibility remains . . . that a section 1282(a)(1) appeal may be available. The possibility, or uncertainty, regarding appealability militates against issuance of a writ here. The Supreme Court has repeatedly stated that a mandamus

> petitioner must "satisfy the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'." *Kerr v. U.S. District Court* [426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976)].
>
> *Bauman, supra,*
> 557 F.2d at 654.

The Petitioner certainly cannot meet this burden here. The point is not addressed in the Petition, and the record which is the basis of the challenged rulings has not been provided to this Court. If indeed the discovery order implicates constitutional concerns under the Tenth Amendment, as Petitioner confidently asserts, any error can certainly be addressed by reversal of the judgment on appeal in the event sanctions are imposed under Federal Rules of Civil Procedure Rule 37(b) for Petitioner's failure to comply with the challenged discovery order. (Petition, page 2.)

C. The District Court's Order Does Not Damage Petitioner in a Way Not Correctable on Appeal.

The Court of Appeals for the Ninth Circuit described the second guideline for issuance of mandamus relief as the determination of "whether the damage . . . arising from the order is correctable on appeal." 557 F.2d at 656. As the court observed, "[i]f the district court's order . . . is wrong and if [petitioner] prevails on the merits, the error can be remedied on appeal without great difficulty." *Id.*

As noted above, any error in the Court's discovery order can be corrected on appeal, and therefore Petitioner

has not borne its burden of proof as to this element of the test for the granting of relief through mandamus.

D. The District Court's Order is Not Clearly Erroneous as a Matter of Law.

The Court of Appeals for the Ninth Circuit requires the Petitioner to show clear error as a matter of law as a prerequisite to the issuance of a writ of mandamus. As the court observed in *Bauman, supra,* 557 F.2d at 654, citing decisions of this Court, " . . . review by mandamus does not 'run the gauntlet of reversible errors'." Rather, "only exceptional circumstances amounting to a 'judicial usurpation of power' will justify the invocation of this extraordinary remedy." *Id.* [citations omitted].

Petitioner cannot demonstrate that the court committed *any* error in deciding that Real Parties in Interest were entitled to certain discovery under well-established principles of federal law (Petitioner's Appendix, pages 33-46). The only cases cited by Petitioner involve this court's refusal to quash a criminal subpoena directed to a U.S. president, *United States v. Nixon,* 418 U.S. 683 (1973) (Petition, page 23) and a manifestly inapposite California Supreme Court decision involving the California Public Records Act, *Times Mirror v. Superior Court,* 53 Cal.3d 1325, 1347 (1991). (Petition, pages 23, 26.)

Therefore, Petitioner has failed to carry its burden of proof as to the propriety or necessity of extraordinary relief by mandamus.

E. The District Court's Order is Not an Oft-Repeated Error which Manifests a Persistent Disregard of the Federal Rules.

The fourth guideline for issuance of mandamus relief comes into play when there is a "recurring pattern of similar and erroneous rulings by the same district judge" which brings the case "within the scope of the principle articulated by the Supreme Court in [*LaBuy v. Howes Leather Co.*, (1957) 352 U.S. 249, 257-260, 77 S.Ct. 309]." Here, there is no evidence of any error, and thus no pattern of error.

F. The District Court's Order Does Not Raise Issues of First Impression Nor Create New and Important Problems.

Finally, the Court of Appeals looks to the "magnitude of the issue" in the determination of whether mandamus is appropriate; to the extent that "[t]he controversy is tied to the peculiar facts of the action," it will not be considered a candidate for mandamus review. *Bauman v. U.S. District Court, supra*, 557 F.2d at 660-661.

The discovery order made by the District Court relied on well-established principles of law. The order contained four basic rulings. First, it stated that non-privileged information should be disclosed:

> The names of the state officials who participated in making the decision to pay employees with registered warrants, which Judge Burrell found are not cash or its equivalent and, hence, violated the Act, are not arguably protected by the deliberative process privilege; neither are the

> facts about when and where pertinent meetings and discussions occurred, the facts that were considered in reaching the decision, the existence of documents recording such meetings and discussions, or the contents of documents to the extent they may only state, explain or justify the decision actually made vis-a-vis the process that produced it. Such information does not threaten the public interest in frank discussion during deliberation of state policy.
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix, page 38.)

Second, it stated the deliberative process privilege must be adequately supported:

> The exchange of ideas, recommendations made and opinions expressed during deliberation of the state's decision to pay employees with registered warrants are within the privilege if it is timely claimed and supported by a suitable affidavit.
>
> * * *
>
> Accordingly, for each claim of deliberative process privilege heretofore asserted by defendants in response to plaintiffs' discovery requests, whether at deposition or by interrogatory or request for production of documents, the state must within 30 days answer whether the discussions inquired about occurred and, if they did, identify when, who participated, the topic of the discussion, and the decision reached, if any. If defendants resist disclosure of the sort of "frank discussion" that is within the privilege, they

must support their claim with the affidavit of the appropriate government official.

Order of Magistrate
Nowinski, dated 6/18/93
(Petitioner's Appendix, page 39.)

Thirdly, it stated the attorney-client privilege was waived by the reliance on advice of counsel as the basis of the good faith defense to FLSA liability (29 USC 216(b)):[1]

---

[1] The Petitioner has taken the position in this discovery dispute that it is entitled to a limited waiver of the attorney-client privilege, such that it can disclose selected communications of counsel and withhold all other information and advice at will (Petition, pages 27-28; letter of Attorney General dated 3/31/93, Petitioner's Appendix pages 154-168). As Petitioner states, "[o]nce Plaintiffs were permitted access to the counsel who actually provided the advice concerning the legal proposition that issuance of registered warrants to State employees did not violate the FLSA, and the facts disclosed that counsel did not indicate the issue as problematic, it is unclear why Plaintiffs should then be entitled to increasingly more and greater access to all the State's attorneys, even as to that one FLSA issue (Petition, pages 27-28).

In actuality, it is perfectly clear why Real Parties in Interest are entitled to full disclosure of advice, as the District Court ruled. Selective disclosure poses the risk that a litigant will gain an advantage by revealing only the information which supports its position. Events subsequent to the U.S. Magistrate Judge's order have borne out the wisdom of the ruling.

On February 10, 1994, the State Controller's Chief Counsel, Richard Chivaro, appeared and testified for the first time without claim of privilege. He revealed that the State *disregarded* the advice of two of its attorneys and deliberately pursued a policy that would make it more difficult for State employees to readily negotiate their registered warrants after the banks began to refuse them and the budget impasse continued in August, 1992.

> . . . assuming that the state might make the required demonstration of a confidential communication from client to attorney, the communication would be privileged. But, if the same communication inextricably included advice about whether the use of registered warrants complied or might not comply with the FLSA, defendants either waive the privilege or impliedly consented to disclose the information by asserting a good faith defense, for which all intents and purposes is no different than an 'advice of counsel' defense. [citations omitted]; 2 Weinstein's Evidence, "Privileges," § 511[02], pp.511-7.
>
> Accordingly, defendants must either withdraw their good faith defense or disclose all of the advice of counsel they received concerning FLSA compliance.
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix,
> pages 41-42.)

Fourthly, it stated the attorney work product privilege was either waived or inapplicable:

> The work product doctrine exists to ensure that in preparing a client's case for trial, a lawyer be allowed to assemble and sift information, identify strengths and weaknesses, and make his plan for presenting his case. The identification

---

The implications of this evidence for Petitioner's liability under the FLSA are significant and demonstrate with clarity why the Real Parties in Interest should be entitled to full access to relevant attorney communications in accordance with the court's order. (See, Respondent's Appendix, pages 2-25.)

> of strengths and weaknesses is apt to be particularly relevant to the question whether defendants had reasonable grounds to believe their continued use of registered warrants complied with the FLSA. To give absolute protection to defendants' attorneys' mental impressions, conclusions, opinions, or legal theories prepared in anticipation of this litigation, thus bars plaintiffs from access to information relevant to test defendants' good faith defense. Under such circumstances, defendants must be deemed to have waived the privilege or to have consented to disclose the information. Alternatively, I find that defendants have put their opinion work product in issue by pleading good faith as a defense and that plaintiff's need for the information is compelling. *See Holmgren v. State Farm Mutual Automobile Ins. Co.*, 1992 U.S. App. Lexis 29008, 92 Daily Journal DAR 15099 (9th Cir. 1992).
>
> Order of Magistrate
> Nowinski, dated 6/18/93
> (Petitioner's Appendix,
> pages 45-46.)

These rulings represent a routine exercise of the federal court's obligation to apply and enforce federal law and procedure for discovery to a case involving a state defendant. These rulings could have arisen in any context where Congress has imposed statutory liability upon the states, and therefore the Petition raises no special concerns about the Tenth Amendment, the principles of federalism, or the provisions of the Fair Labor Standards Act. (See, Petitioner's "Questions Presented," Petition, page i.) If the Federal Rules of Civil Procedure are to be implemented by trial courts as Congress intended, the

challenged discovery order in this case must be allowed to stand until the issues are ripe for review on appeal. *Kerr v. United States District Court*, 426 U.S. 394, 402-404, 96 S.Ct. 2119, 2123-2124, 48 L.Ed.2d 725.

II.

CONCLUSION.

For all the reasons stated, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

Dated:
March 3, 1994

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By: CATHLEEN A. WILLIAMS

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants. _____/	No. CIV-S 92-1115 GEB-PAN No. CIV-S 92-1493 GEB-PAN No. CIV-S 92-1544 GEB-PAN

JAMES R. ADAMS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

JOHNNY G. ADKINS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING PLAINTIFFS' SUPPLEMENTAL MOTION FOR ORDER FOR SANCTIONS AGAINST DEFENDANT RE: NON-RESPONSIVENESS TO DISCOVERY ORDERS UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 37(b)(2) and Rule 37(d)

Date: 3/2/94
Time: 9:00 AM
Place: Dept. 10

I.

INTRODUCTION

Since Plaintiffs' Motion for Sanctions was filed on February 2, 1994,[1] the Defendants' intransigence in resisting the discovery orders of this Court has deepened, with one notable exception: on February 10, 1994, the State Controller waived the attorney-client privilege and deliberative process privileges previously asserted and Chief Counsel Richard Chivaro appeared and testified at his deposition.

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[1] For the background of this action and status of discovery, Plaintiffs request that reference be made to the original motion, Points and Authorities, pages 1-19.

This supplemental motion is filed in order to place a complete record before the Court of the Defendants' conduct as it relates to the award of sanctions and to ensure that Defendants' claims of lack of notice have been adequately addressed. This supplemental motion raises two issues relevant to the imposition of sanctions: First, it outlines the conscious policy of Defendants to continue their non-compliance with the Court's orders, and, second, defines the prejudice Plaintiffs will suffer if any lesser sanction is imposed.

A. Prejudice.

For purposes of this motion, the significance of Mr. Chivaro's testimony is that he provided Plaintiffs a glimpse – albeit brief and partial – into the shadowy inner circle of policymakers who were actually deciding the State's course of conduct during the politically tumultuous months of the budget impasse. In providing this glimpse, his testimony has allowed Plaintiffs to define with far more precision the actual prejudice they have suffered because of their inability to pierce the curtain of secrecy Defendants have drawn around the identity and role of these policymakers.

It is critical for Plaintiffs to demonstrate such prejudice if the Court is to impose the harsh sanction of striking Defendants' "good faith" defense in this FLSA action, as the Court of Appeals for the Ninth Circuit has repeatedly held. See, Motion filed February2, 1994, pages 24-26.

B. Continuing Non-Compliance.

In addition, the events since February 2, 1994, demonstrate with stark clarity the Defendants' defiance of this Court's authority. At the time of the previous motion, the thirty-day stay of the re-commencement of the deposition of Robert Hauck had not yet expired, and Defendants presumably could still argue that the Supreme Court might grant their (not yet filed) application for stay of discovery. Indeed, on February 3, 1994, Deputy Attorney General Larry Raskin advised Plaintiffs' counsel in writing that "until the Supreme Court rules on the application for stay, the same privileges which have been asserted up until now would continue to be asserted in all the depositions scheduled for next week." (Supplementary Declaration of Cathleen A. Williams in Support of Plaintiffs' Motion for Sanctions filed February 8, 1994, attached as Appendix 1 in Appendices to Plaintiffs' Supplemental Motion, filed herewith, "Exhibit A" thereto.)

However, the application for stay was summarily denied by the Supreme Court on February 4, 1994, before the depositions were scheduled to commence on February 7, 1994 (Supplementary Declaration of Cathleen A. Williams, Appendix 1 hereto.) Notwithstanding this fact, when the Deputy Attorney General appeared for the duly-noticed deposition of Mr. Hauck on February 7, 1994, Mr. Hauck was not produced as a witness. (Appendix 1 hereto, its "Exhibit F"). On the next day, February 8, 1994, Mr. Stancell also did not appear for his deposition (Appendix 1 hereto, its "Exhibit G") and the State declared its intention to continue to assert privileges with respect to the deposition of Mr. Hill.

It is thus clear that Defendants no longer relied on any legal pretext or rationale to explain their refusal to comply with the orders of this Court.

It is critical for Plaintiffs to place this evidence before the Court so that the record is complete as to the wilful violations of the State of court-ordered discovery.

II.

CHRONOLOGY AND STATUS OF DISCOVERY SINCE FEBRUARY 2, 1994

2/2/94: Motion for Sanctions Filed.

2/3/94: Defendants counsel Deputy Attorney General Larry G. Raskin advises that the State's Petition for Certiorari was filed on that date, and the application for a stay "will be filed tomorrow," stating, "The same privileges which have been asserted up till now would continue to be asserted in all of the depositions scheduled for the next week." (Appendix 1 hereto, its "Exhibit A".)

2/4/94: Application for Stay denied by Supreme Court (see, Appendix 2 hereto, February 4, 1994 letter from Supreme Court).

2/7/94: Deposition of Robert Hauck commences; deponent does not appear. Defendants' counsel states on the record he will not appear. (Appendix 1 hereto, "its" Exhibit F, page 3, lines 13-14.)

2/8/94: Deposition of LaFenus Stancell commences; deponent does not appear. Defendants' counsel states privileges are and will continue to be claimed. (Appendix 1 hereto, "Exhibit G," page 3 line - page 4 line 8.) Defendants' counsel states the same privilege will be asserted

with respect to Eugene Hill, whose deposition is scheduled for February 10, 1994. (Appendix 1 hereto, "Exhibit G," page 6, lines 18-27.)

2/8/94: Plaintiffs file Supplementary Declaration of Cathleen A. Williams (Appendix 1 hereto).

2/9/94: Plaintiffs' counsel receives Defendants' Opposition to Motion for Sanctions, claiming motion untimely because of filing of Supplementary Declaration. (Opposition on file; judicial notice requested.)

2/10/94: Deposition of Richard Chivaro, Chief Counsel for the Controller, commences; deponent appears and testifies without claim of privilege. (Transcript attached as Appendix 4 hereto.)

2/11/94: Plaintiffs' file Reply to Defendants' Opposition, personally served and mailed on Defendants. (Appendix 3 hereto.)

2/14/94: Court orders continuance of February 2, 1994 motion to February 23, 1994. (Stipulation on file; judicial notice requested.)

2/16/94: Plaintiffs' file instant motion, to be set for March 2, 1994.

III.

THE TESTIMONY OF RICHARD CHIVARO DEMONSTRATES THE MATERIALITY OF THE INFORMATION WITHHELD BY DEFENDANTS AND THE PREJUDICE SUFFERED BY PLAINTIFFS.

A. Background.

From the time the first deposition was taken in this case, of LaFenus Stancell on August 18, 1992, Plaintiffs

have sought to discover the circumstances surrounding the State's initial decision, at the suggestion of the State Controller, to make available to State employees an alternative means of cashing their registered warrants after major banks announced in mid-July that they would no longer accept them. (Stipulation re: Discovery Disagreements filed hereton June 4, 1993, pages 53-57.) The State Controller proposed that State employees be given the opportunity to exchange their warrants for cash by presenting them to their departments' "revolving funds." At his deposition, Mr. Chivaro explained the reasoning of the State Controller in urging adoption of the policy, and his subsequent communications with Senior Assistant Attorney General Eugene Hill[2] seeking authorization from the Department of Finance for the exchange program.

> "Q. [by Ms. Williams] Okay. So before you called him [Mr. Hill] he had been informed about the communications from the Controller's office to Mr. Stancell about the program?
>
> A. Yes, prior to contacting the Department of Finance – well, let me back up a little bit.
>
> When it became apparent to us that some banks were going to back out of this deal, our office became more and more uncomfortable with running afoul of the FLSA, and we contacted Gene with the idea that we needed to have a fall-back position in the event that the banks were not going to continue to accept

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[2] As noted in the previous motion, Mr. Chivaro previously testified that the State Controller was acting upon Mr. Hill's advice. (Motion, page 12.)

these. And we – the suggestion was mine that we utilize the payroll revolving funds. The idea had been discussed in the Biggs case early on for making payments to the employee in the absence of a state budget, so it was something that was kicked around before.

But, again, utilizing the revolving fund has to have the approval of the Department of Finance. Department of Finance limits its use to very specific purposes. We want approval to use it for this purpose. We felt that if Gene Hill could explain to the Department of Finance again what the vulnerability was with the FLSA and subjecting them to potential damages, that he would be the best one to make the argument for us."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 132:22-133:18.

Mr. Hill was in agreement with the Controller's position that the "revolving fund" exchange program was advisable, and the FLSA implications of any failure by the State to ensure the negotiability of registered warrants were explicitly discussed:

"Q. And how did you explain to Mr. Hill your perception of the vulnerability of the registered warrants under FLSA? What did you say to him?

A. Well, the conversation was to the effect – I don't recall the exact words, but it was to the effect that we had to have cash equivalent under the FLSA, and that obviously if the banks were not accepting these things, it would be hard to characterize them as a cash equivalent under

any circumstance. If you can't redeem them, what good are they.

We discussed this with Gene Hill. Gene Hill was very concerned about the fact that the banks were pulling out, and he agreed with us that something needed to be done, and that is when I ran the suggestion by him. He thought it was a good suggestion and he agreed to take it forward for us."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 134:24-135:11.

In fact, Mr. Chivaro believed that an understanding had been reached with Mr. Hill:

"A. I think it was our understanding that we could not require anybody to use their revolving funds in this matter; that we needed the Department of Finance to issue some instructions to them as to how this would work.

We would have no authority to require that it would be done. It was our intent that they do it, and it was our understanding with Gene Hill that he would do whatever he could to get the Department of Finance to make the revolving funds available to everybody."

Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 138:7-138:16.

Subsequently, however, the State Controller's office learned that the Department of Finance had cancelled the exchange program. It received a memo around July 30, 1992 from Finance which seemed to "make it clear, contrary to our understanding, that the exchange program

was to be considered a one-time procedure which would apply to the July master payroll only." (Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto, 136:6-136:9, and Exhibit 20).

Mr. Chivaro then called Mr. Hill about the cancellation of the registered warrant/revolving fund exchange:

> "A. We immediately – Bob Shuman and I immediately called Gene Hill about that. We had fax'd that for his information and then followed it up with a telephone call shortly thereafter. We were concerned because the procedure was worked out with Gene Hill with the understanding that if the banks were pulling out, that we needed a mechanism that the employees would still be guaranteed payment. And Gene Hill was supposed to have worked with the Department of Finance and possibly even the Governor's office – I'm not quite sure whether he did that or not – to make sure that this system would work and there would be no interference from any other agency.
>
> Gene, at the time we called him, basically stated that he had no explanation, that he thought that everybody was in agreement that the revolving funds could be used."
>
> Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 132:5-132:21.

After this call, there was one further communication with Mr. Hill on the decision to cancel the exchange program:

> "Q. When the program was discontinued by Department of Finance and you spoke to Gene

Hill, you said that he told you he didn't have an explanation?

A. As to why Finance had – he –

Q. No, you go ahead.

A. I'm sorry. He did later call us back and tell us that Finance had some concerns with the – that the revolving fund accounts of each agency would be depleted and then they would have to operate without revolving funds, and we would have to replenish them with the registered warrant.

We do not maintain records which would indicate the balances of each agency general fund – revolving fund, so we would not know how much money they had available to them at the time, and we would not know whether or not they had actually depleted it on the basis of their payroll.

Q. Well, did you discuss with him at that time that the revolving funds, if in fact they were being depleted, could be replenished by submitting the registered warrants to some bank for cashing?

A. Yes, we did.

Q. And what did he say to that, if anything?

A. Basically that it wasn't his call, that he would talk to the Department of Finance about it. But we did not know and we were not privy to the conversation that they had with Finance

> or whoever he spoke to concerning this problem."
>
> Deposition of Richard Chivaro, taken 2/10/94, (Appendix 4 hereto), 135:12-136:11.

Of course, it is precisely the discussions that Mr. Hill had with the Department of Finance that the State has not disclosed under its continuing claim of privilege. (See, Points and Authorities in Support of Plaintiffs' Motion for Sanctions filed February 2, 1994, pages 17-19.) Mr. Chivaro's testimony establishes that the cancellation occurred even though two attorneys agreed that it was advisable for the State to provide State employees with an alternative means of cashing their registered warrants in light of the requirement that employees be paid "in cash or its equivalent" under the FLSA.

Given the State's burden of proof with respect to the good faith defense, i.e., that "it had an honest intention to ascertain the requirements of the Act and reasonable grounds for believing that their conduct was not violative," (see, Order of Magistrate Nowinski, dated June 18, 1993, previously attached as "Exhibit A" to Plaintiff's Motion for Sanctions filed February 2, 1994), the testimony was a startling revelation. The Department of Finance disregarded the advice of the Controller's Chief Counsel, with which Mr. Hill was in complete agreement, and deliberately pursued a policy which would make it more difficult for State employees to readily negotiate their registered warrants after banks began to refuse them and the budget impasse continued in August, 1992.

The testimony is also startling because it contravenes the central tenet of the State's position throughout the discovery dispute now before the Court. The State has consistently claimed it has nothing to hide. In the March letter in which Defendants outlined "the case it intends to put on," (see, page 8, Order of Magistrate Nowinski, dated June 18, 1993, previously attached as "Exhibit A" to Plaintiffs' Motion for Sanctions filed February 2, 1994), counsel made the following representation:

> "The Controller's legal counsel and the DPA's legal counsel both authored separate legal analysis upholding the use of registered warrants as payment to state employees, and the state's action did not deviate from that advice once it became necessary to issue registered warrants . . . "
>
> Joint Stipulation filed June 4, 1993, Exhibit F, "State's Description of its Case," (unnumbered) page 3, Appendix 54, [This document is also included in the Petition as Appendix, page 166.] Petition for Writ of Certiorari filed on or about February 3, 1994, Appendix, page 166.)

In sum, the State not only concealed this critical information but represented to the parties *and to the Court* that it did not exist.

As noted in Plaintiffs' Motion for Sanctions filed February 2, 1994, the Ninth Circuit has defined the type of prejudice which justifies the sanction of dismissal as wilful conduct which "threaten[s] to interfere with a rightful decision of the case." *Fjelstad v. American Honda*

Motor Co., (9th Cir. 1985), 762 F.2d 1334, 1337-1342. Mr. Chivaro's testimony reveals that this type of extreme prejudice is present in this case.

IV.

CONTINUING NON-COMPLIANCE AFTER FEBRUARY 2, 1994

As noted above, after February 4, 1994, when the Supreme Court denied the application for stay filed on that date, all the State's excuses and arguments for avoidance of the June 18, 1993 order dropped away, and the underlying State "policy" of non-disclosure was revealed.

The Court of Appeal for the Ninth Circuit has repeatedly made clear that the dismissal sanction should be imposed for wilful, as opposed to negligent or inadvertent, violations of discovery orders. (See, e.g., *Porter v. Martinez*, (1992), 941 F.2d 732, 733, where the court reversed the dismissal of a case brought by a "homeless, indigent, severely handicapped" *pro se* plaintiff who had failed to comply with court-ordered discovery; also, *Fjelstad v. American Honda Motor Co.*, (9th Cir. 1985), 762 F.2d 1334.) The State's refusal to produce deponents for depositions – in the face of the Court's warning and during the pendency of the Motion for Sanctions – can only be described as flagrant. Therefore, the most severe sanction of dismissal in accordance with this Court's January 6, 1994 warning is warranted.

V.

CONCLUSION

On t he basis of the State's conduct in this case, the sanctions outlined in January 6, 1994 order should be imposed. In addition, Plaintiffs should be awarded the costs and fees incurred in bringing this motion and preparing and convening the depositions of Mr. Hauck, Mr. Stancell and Mr. Chivaro.

Respectfully submitted,

Dated: February 16, 1994

CARROLL, BURDICK & McDONOUGH
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Cathleen A. Williams, Esq.

By: /s/
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants. _____/	No. CIV-S 92-1115 GEB-PAN No. CIV-S 92-1493 GEB-PAN No. CIV-S 92-1544 GEB-PAN

JAMES R. ADAMS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

JOHNNY G. ADKINS, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

_____/

APPENDICES TO PLAINTIFFS' SUPPLEMENTAL MOTION FOR ORDER FOR SANCTIONS AGAINST DEFENDANT RE: NON-RESPONSIVENESS TO DISCOVERY ORDERS UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 37(b)(2) and Rule 37(d)

Date: 3/2/94
Time: 9:00 AM
Place: Dept. 10

The attached documents are filed as Appendices to Plaintiffs' Supplemental Motion for Order for Sanctions against Defendant re: Non-Responsiveness to Discovery Order.

DECLARATION

I, CATHLEEN A. WILLIAMS, declare:

1. I am an attorney at law, duly licensed to practice before all of the courts in the State of California, and am an Associate with the law firm of CARROLL, BURDICK & McDONOUGH, attorneys of record for Plaintiffs and Consenters herein.

2. I declare that all the documents attached hereto are true and accurate copies of pleadings already filed with the Court in this matter, correspondence sent and

received by me in this action, and certain pages of original transcripts of depositions which have been previously taken in this action.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed at Sacramento, California on February 16, 1994.

/s/
CATHLEEN A. WILLIAMS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL L. PARR, et al.,
Plaintiffs,
vs .
STATE OF CALIFORNIA,
Defendant.
_____/

No. CIV-S 92-1115
GEB-PAN
CERTIFIED COPY

Deposition of
RICHARD J. CHIVARO
February 10, 1994
Volume 2
Reported by: HEATHER S. OLSON, CSR 4680

Phillips and Associates
CERTIFIED SHORTHAND REPORTERS

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* * *

[p. 132] Mr. Hill

Do you know if there was a response from Gene Hill concerning Bob Shuman's message that DOF had halted the registered warrant/revolving fund check exchange?

A. We immediately – Bob Shuman and I immediately called Gene Hill about that. We had fax'd that for his information and then followed it up with a telephone call shortly thereafter. We were concerned because the procedure was worked out with Gene Hill with the understanding that if the banks were pulling out, that we needed a mechanism that the employees would still be guaranteed payment. And Gene Hill was supposed to have worked with the Department of Finance and possibly even the Governor's office – I'm not quite sure whether he did that or not – to make sure that this system would work and there would be no interference from any other agency.

Gene, at the time we called him, basically stated that he had no explanation, that he thought that everybody was in agreement that the revolving funds could be used.

Q. Okay. So before you called him, he had been informed about the communications from the controller's office to Mr. Stancell about the program?

A. Yes, prior to contacting the Department of Finance – well, let me back up a little bit.

When it became apparent to us that some banks were going to back out of this deal, our office became [p. 133] more and more uncomfortable with running afoul of the FLSA, and we contacted Gene with the idea that we needed to have a fall-back position in the event that the banks were not going to continue to accept these. And we – the suggestion was mine that we utilize the payroll revolving funds. The idea had been discussed in the Biggs case early on for making payments to the employee

in the absence of a state budget, so it was something that was kicked around before.

But again, utilizing the revolving fund has to have the approval of the Department of Finance. Department of Finance limits its use to very specific purposes. We wanted approval to use it for this purpose. We felt that if Gene Hill could explain to the Department of Finance again what the vulnerability was with the FLSA and subjecting them to potential damages, that he would be the best one to make the argument for us.

And he later called us back and told us that it was – it was okay, that Finance would allow use of this. We then initiated contact with the Department of Finance to ensure that everything was in place, and then, to our surprise, Finance cancelled the program.

Q. Now, in this conversation with Mr. Hill where you – where you wanted to explain the vulnerability of the registered warrants, as you saw it, once some banks started pulling out, can you tell me the approximate date of that conversation?

[p. 134] A. Well, the approximate date was whenever the Bank of America had announced they were no longer going to accept these things. There had been rumors circulating that the banks were going to pull out. Of course, everybody was hopeful that by the time they did that there would be a budget in place and there would not be a problem.

But it became apparent to us there was not going to be a budget in place and that the banks were going to pull out, and then the premise which we had basically

had some comfort level in was that if the banks were accepting them, readily cashing them, then there wasn't really a problem with the FLSA, that notion was starting to vaporize. And so what we did was we had a fall-back position that was designed and discussed with the attorney general.

Q. Okay. And so I think in your previous deposition, correct me if I'm wrong, you said there was direct word from the Bank of America right around the middle of July, about a week before the public announcement which was on July 23rd. So was it in that time period that you spoke to Mr. Hill?

A. Uh-hmm, yes.

Q. And how did you explain to Mr. Hill your perception of the vulnerability of the registered warrants under FLSA? What did you say to him?

A. Well, the conversation was to the effect – I don't recall the exact words, but it was to be the effect [p. 135] that we had to have cash equivalent under the FLSA, and that obviously if the banks were not accepting these things, it would be hard to characterize them as a cash equivalent under any circumstance. If you can't redeem them, what good are they.

We discussed this with Gene Hill. Gene Hill was very concerned about the fact that the banks were pulling out, and he agreed with us that something needed to be done, and that is when I ran the suggestion by him. He thought it was a good suggestion and he agreed to take it forward for us.

Q. When the program was discontinued by Department of Finance and you spoke to Gene Hill, you said that he told you he didn't have an explanation?

A. As to why Finance had – he –

Q. No, you go ahead.

A. I'm sorry. He did later call us back and tell us that Finance had some concerns that the – that the revolving fund accounts of each agency would be depleted and then they would have to operate without revolving funds, and we would have to replenish them with the registered warrant.

We do not maintain records which would indicate the balances of each agency general fund – revolving fund, so we would not know how much money they had available to them at the time, and we would not know whether or not they had actually depleted it on the basis of their payroll.

[p. 136] Q. Well, did you discuss with him at that time that the revolving funds, if in fact they were being depleted, could be replenished by submitting the registered warrants to some bank for cashing?

A. Yes, we did.

Q. And what did he say to that, if anything?

A. Basically that it wasn't his call, that he would talk to the Department of Finance about it. But we did not know and we were not privy to the conversation that they had with Finance or whoever he spoke to concerning this problem.

Q. Did you communicate with Marsha Bedwell, who I believe you identified as Chief Counsel, Department of Finance, on the issue of revolving funds?

A. I did not.

Q. Do you know if anyone from the controller's office did?

A. I know that we did not, because, as I stated, Gene Hill was going to be our liaison between the two offices, and we figured they were more inclined to listen to their attorneys' advice as opposed to the controller's advice.

Q. Now, we skipped forward in time to the period of the revolving funds, and I want to go back now and refer you to page 27 of your deposition.

A. Did you want to do that before we talked about Exhibit 22?

Q. Oh, I thought there were only 20. Let's go on [p. 137] to 22. I lost count.

A. Exhibit 22 is a memo from Financial Management Division of the Department of Finance to all accounting officers, superintendents and business managers, which we got a copy of it around July 30, 1992.

This memo from Finance seems to make it clear, contrary to our understanding, that the exchange program was to be considered a one-time procedure which would apply to the July master payroll only.

And then there's a – a paragraph in here that NCYC – I have no idea who that is – "The accounting staff at

NCYC contacted all the local banks and asked if they would be redeeming Registered Payroll Warrants," and the recommendation that the banks follow the procedures of NCYC, whoever that may have been.

Q. Okay. Now, I want to clarify, this is from the Department of Finance?

A. Yes.

Q. To its internal division?

A. No, I believe they sent that to all agencies.

Q. Okay. In terms of the thing that you've already noted, that is the statement at the end of the first paragraph that the exchange program is to be considered a one-time procedure which will apply to July master payroll only, in your discussions with Mr. Hill and Mr. Stancell had a time limit on the program been raised?

A. No, and that's the first time we ever saw the [p. 138] time limit. It was our intent to make it available as long as necessary.

Q. Okay. Now, it also states here in the second paragraph that "They," the SCO, "are not 'requiring' that we comply . . . " with the exchange program.

Was that your understanding?

A. I think it was our understanding that we could not require anybody to use their revolving funds in this matter; that we needed the Department of Finance to issue some instructions to them as to how this would work.

We would have no authority to require that it would be done. It was our intent that they do it, and it was our understanding with Gene Hill that he would do whatever he could to get the Department of Finance to make the revolving funds available to everybody.

Q. Okay. And do you know who Tim Sutherland is?

A. No, I don't.

Q. Now, at the top of this undated memo it reflects that it was sent by the Division of Accounting on July 30, 1992.

A. Right.

Q. Did you see it soon after that date?

A. I saw it on that date. It came from Carla Lenerd in our accounting office.

Q. Was it this that motivated you to make a follow-up call to Mr. Hill?

A. Yes, because we were very concerned that this

* * *